

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: ASBESTOS PRODUCTS
LIABILITY LITIGATION (NO. VI)**

This document relates to:

**Cases from the law firm of
Cascino Vaughan Law Offices, Ltd.**

Civil Action No. MDL 875

**U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN,
MADISON DIVISION**

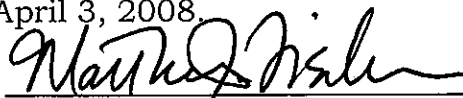
**Suoja v. Owens-Illinois, Inc., et al.,
No. 99-0475**

NOTICE OF FILING

PLEASE TAKE NOTICE that on April 3, 2008, Defendant Owens-Illinois, Inc. filed with the above-captioned court its **Motion to Quash Plaintiff's Notice of Deposition and Rider**.

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true and correct copy of this Notice and Defendant Owens-Illinois, Inc.'s **Motion to Quash Plaintiff's Notice of Deposition and Rider** was served upon Plaintiff's counsel via facsimile and regular mail on April 3, 2008.



One of the attorneys for Owens-Illinois, Inc.

Robert H. Riley
Matthew J. Fischer
Renee C. Kelley
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6600 Sears Tower
233 South Wacker Drive
Chicago, IL 60606-6473
Phone: (312) 258-5500
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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: ASBESTOS PRODUCTS
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**Cases from the law firm of
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**U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN,
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**Suoja v. Owens-Illinois, Inc., et al.,
No. 99-0475**

Civil Action No. MDL 875

**DEFENDANT OWENS-ILLINOIS, INC.'S OBJECTIONS AND
MOTION TO QUASH
PLAINTIFF'S NOTICE OF DEPOSITION AND RIDER**

NOW COMES Defendant Owens-Illinois, Inc. ("Owens-Illinois") and for its Objections and Motion to Quash Plaintiff's Notice of Deposition and Rider, states the following:

1. Plaintiff filed her complaint in this matter on August 5, 1999, in the United States District Court for the Western District of Wisconsin, alleging that her Decedent Oswald F. Suoja ("Decedent") contracted mesothelioma as a result of his alleged exposure to asbestos "at various job sites" in Wisconsin during his career as "an asbestos worker."
2. The complaint named Owens-Illinois and T&N Ltd., f/k/a T&N PLC, as Defendants. Plaintiff asserted products liability and conspiracy claims

against the Defendants and claims for loss of consortium and punitive damages.

3. Owens-Illinois manufactured an asbestos containing insulation product called Kaylo in commercial quantities from 1948 to 1958. In 1958, it sold that business to Owens Corning Fiberglass Corporation, a separate company. Between 1953 and April 30, 1958, Owens Corning Fiberglass was a distributor of kaylo manufactured by Owens-Illinois.
4. Exhibit B to Plaintiff's complaint alleges that Decedent worked as follows:

1951-52	Indiana Michigan Power Co.	Lawrenceburg, Indiana
1952-54	Milwaukee House of Correction	Milwaukee, Wisconsin
1954-56	Badger Ordnance Works	Baraboo, Wisconsin
1970's	Sundstrand	Rockford, Illinois

There are no other allegations of exposure. There are no witnesses disclosed to provide any factual basis for Plaintiff's claims.

5. This case was transferred from the Western District of Wisconsin to the Eastern District of Pennsylvania's Asbestos MDL No. 875. Plaintiff filed a Motion to Suggest Remand on February 20, 2008. That motion has not been ruled upon.
6. On March 31, 2008, counsel for Owens-Illinois received, via U.S. mail, Plaintiff's Notice of Deposition "pursuant to Federal Rules of Civil Procedure Rules 26 and 30" of "the person(s) described on the attached Rider," to be taken on April 10, 2008, at 10:00 a.m. in Chicago, Illinois. The Rider states in full:

The deponent's name is unknown. The deponent(s) shall be a corporate representative familiar with the records that Owens Corning provided to Owens-Illinois for sales and/or shipments of asbestos. The deponent shall be able to identify all such records and testify as to what was turned over to Owens Illinois and provide details relating to those records.

A copy of the Notice is attached as Exhibit A.

7. Owens-Illinois objects to the Notice and Rider as improper and defective in a number of ways, and asks that this Court quash the Notice and Rider.
8. First, Plaintiff presumes that Owens Corning provided records to Owens-Illinois "for sales and/or shipments of asbestos." Owens-Illinois has never sold or shipped asbestos to customers. Asbestos was sold and shipped to Owens-Illinois and used as a material in the production of Kaylo products, but Owens-Illinois was never a commercial seller or shipper of asbestos. Moreover, Owens-Illinois is unaware that any usable records relating to the sales or shipment of Kaylo were provided to it by Owens Corning. In fact, Owens-Illinois tried to get the Owens Corning database in a usable form from Owens Corning but was unable to do so, as indicated in the attached transcript (Exhibit B). Plaintiff's notice thus requests information possessed not by Owens-Illinois, but by Owens Corning Fiberglass. Plaintiff may obtain the information from that source.
9. Second, Plaintiff's request is grossly overbroad. Of the four job sites identified by Plaintiff as relevant to this lawsuit, only two - The Milwaukee House of Corrections between 1952 and 1954 and Badger

Ordinance Works between 1954 and 1956 – could possibly be relevant. Nonetheless, Plaintiff wishes to conduct discovery of Owens-Illinois without any limitation in scope, time or geography. Plaintiff asks for discovery of nationwide sales over a unilateral period of time. Accordingly, Plaintiff's request is not reasonably calculated to lead to admissible evidence.

10. Third, Plaintiff's counsel entirely failed to confer with Defendant's counsel as to the time, location, or availability of the witness(es) for deposition. Plaintiff's counsel made no attempt to determine whether an Owens-Illinois "corporate representative" was available to be deposed on April 10 and no attempt to determine whether such a representative would be available in Chicago on that date.
11. Fourth, the Notice is defective because, although it refers generically to "Rule 30," it fails to specify whether Plaintiff seeks to take the deposition pursuant to Rule 30(b)(1) or to Rule 30(b)(6). *See Sears v. Amer. Entertainment Group, Inc.*, No. 94-C-0165, 1995 WL 66411, at *1 (N.D. Ill. Feb. 13, 1995)(holding notice of deposition was defective because it failed to specify whether deposition taken pursuant to Rule 30(b)(1) or 30(b)(6) and did not designate whether deponents were to testify on behalf of corporation or in their individual capacities).
12. Under Rule 30(b)(6), the proper procedure is to name the corporation as the deponent and request that it designate one or more employees to testify on its behalf. Fed. R. Civ. P. 30(b)(6); *see Payne v. McKune*, No.

06-3010-JWL, 2007 WL 3036190, at *1 (D. Kan. Oct. 16, 2007)(motion to quash granted where notice and subpoena did not designate the corporate party as the deponent but rather designated “unnamed corporate officers”); *compare* Fed. R. Civ. P. 30(b)(1) (“If the [deponent’s] name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.”). Plaintiff’s Notice does not name Owens-Illinois as the deponent.

13. In contrast to a Rule 30(b)(6) deposition, a witness whose deposition is noticed pursuant to Rule 30(b)(1) generally testifies in his individual capacity, even if the witness is an employee of the defendant corporation. *See Sears*, 1995 WL 66411, at *1. Only an officer, director, or managing agent of a defendant corporation can provide testimony that will bind the corporation in a Rule 30(b)(1) deposition. *See id.*; *Stone v. Morton Int’l, Inc.*, 170 F.R.D. 498, 502-03 (D. Utah 1997).
14. Further, if Plaintiff seeks to depose pursuant to Rule 30(b)(1) a corporate employee or agent who is not an officer, director, or managing agent, Plaintiff’s Notice is defective because it must be accompanied by a subpoena pursuant to Fed. R. Civ. P. 45. *See Stone*, 170 F.R.D. at 503 (only officers, directors, and managing agents are subject to deposition by notice).
15. Moreover, if Plaintiff in fact seeks to depose an Owens-Illinois corporate representative pursuant to Rule 30(b)(6), the deposition must proceed at


Owens-Illinois' principal place of business, in Toledo, Ohio, unless Plaintiff demonstrates that "unusual circumstances" justify conducting the deposition in another location. *See, e.g., Tailift USA, Inc. v. Tailift Co., Ltd.*, No. 03-CV-0196-M, 2004 WL 722244, at *1-2 (N.D. Tex. Mar. 26, 2004)(plaintiff's burden to show peculiar circumstances justify taking a corporate representative's deposition in a location other than principal place of business); *Sears*, 1995 WL 66411, at *1 (corporation's objection to a deposition noticed for a location other than its principal place of business should be sustained unless plaintiff shows unusual circumstances justify such an inconvenience to the corporation). Such circumstances do not exist here, and Plaintiff cannot establish that they do, nor has she attempted to do so.

16. Owens-Illinois also objects to the Notice and Rider, and asks the Court to quash same, on the basis that Plaintiff is abusing the deposition procedures and is seeking discovery in a manner that is unduly burdensome. Pursuant to Fed. R. Civ. P. 26(b)(2)(C)(i), the Court may limit the extent of discovery which "can be obtained from some other source that is more convenient, less burdensome, or less expensive." Plaintiff has not even attempted to use the significantly less expensive, less burdensome mechanism of interrogatories to seek information about "the records that Owens Corning provided to Owens-Illinois for sales and/or shipments of asbestos." Owens Corning is on record as being willing to answer specific requests with the advantage of its searchable

database. That less expensive and more reasonable option can and should be pursued.

WHEREFORE, Defendant Owens-Illinois respectfully requests that this Court quash Plaintiff's Notice of Deposition and Rider, and grant Owens-Illinois all other appropriate relief.

SCHIFF HARDIN LLP

By: 
One of the Attorneys for Defendant
OWENS-ILLINOIS, INC.

Robert H. Riley
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Renee C. Kelley
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CH2\2419231.1

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

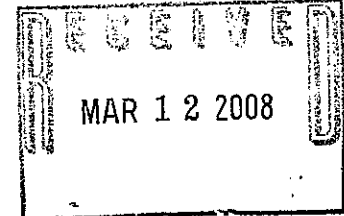
IN RE: ASBESTOS PRODUCTS LIABILITY
LITIGATION (NO. VI)

This Document Relates To:

Cases from the law firm of
Cascino Vaughan Law Offices, Ltd.

U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN,
MADISON DIVISION

Suoja v. Owens-Illinois, et al.,
Case No. 99-0475



Civil Action No. MDL 875

NOTICE OF DEPOSITION

TO: Robert Riley
Schiff Hardin LLP
233 S Wacker Drive
Chicago, IL 60606

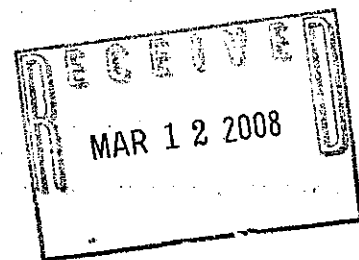
PLEASE TAKE NOTICE that the deposition of the person(s) described on the attached Rider will be taken pursuant to Federal Rules of Civil Procedure Rules 26 and 30, before a court reporter, on April 10, 2008, at 10:00 a.m. at Cascino Vaughan Law Offices, 220 South Ashland Avenue, Chicago, Illinois.

A handwritten signature in black ink, appearing to read "Michael P. Cascino".

Michael P. Cascino
Cascino Vaughan Law Offices, Ltd.
220 S. Ashland Ave.
Chicago, IL 60607
(312) 944-0600

RIDER

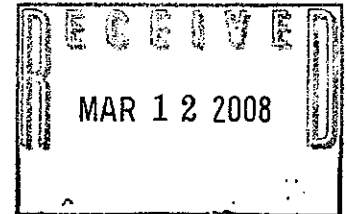
The deponent's name is unknown. The deponent(s) shall be a corporate representative familiar with the records that Owens Corning provided to Owens-Illinois for sales and/or shipments of asbestos. The deponent shall be able to identify all such records and testify as to what was turned over to Owens Illinois and provide details relating to these records.



CERTIFICATE OF SERVICE

I hereby certify under penalties as provided under 28 U.S.C. Sec. 1746 that I served this Notice of Deposition to Owens-Illinois upon the attorney listed below by depositing a true and correct copy of same in the U.S. mail, with proper postage prepaid, at 220 S. Ashland Ave., Chicago, IL 60607, on March 11, 2008.

Robert Riley
Schiff Hardin LLP
233 S Wacker Drive
Chicago, IL 60606




Arlene J. Kaminski

Michael P. Cascino
Cascino Vaughan Law Offices
220 S. Ashland Ave.
Chicago, IL 60607
(312) 944-0600
mcascino@cvlo.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

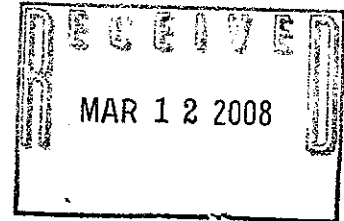
IN RE: ASBESTOS PRODUCTS LIABILITY
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This Document Relates To:

Cases from the law firm of
Cascino Vaughan Law Offices, Ltd.

U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN,
MADISON DIVISION

Suoja v. Owens-Illinois, et al.,
Case No. 99-0475



Civil Action No. MDL 875

REQUEST FOR PRODUCTION OF DOCUMENTS TO OWENS-ILLINOIS

Now comes Plaintiff, Delores Suoja, individually and as special administrator for the estate of Oswald F. Suoja, by one of her attorneys, Michael P. Cascino, and pursuant to Federal Rules of Civil Procedure Rules 26 and 34, requests defendant Owens-Illinois to produce the following documents. Said documents are to be produced within 30 days of service at Cascino Vaughan Law Offices, Ltd., 220 S. Ashland Avenue, Chicago, IL 60607, or such location as mutually agreed upon by counsel.

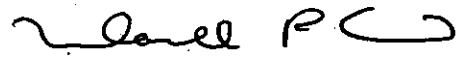
PRIVILEGE

1. Identify all documents for which privilege is claimed and state the basis for the claim.

REQUEST FOR PRODUCTION

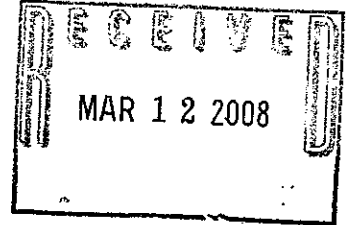
1. All documents including invoices that were given to Owens-Illinois by Owens Corning for sales and/or shipment of asbestos during the years 1951 through 1980 to the job sites listed on Exhibit "A."

2. All documents including affidavits of asbestos exposure used for settlements of asbestos claims and all depositions in Owens-Illinois' possession which concern the job sites listed on Exhibit "A" during the period of 1951 through 1984. This does not seek affidavits provided by the Cascino Vaughan law firm).
3. All batch records for Kaylo production during the time period of 1951 through 1958.



One of Plaintiff's Attorneys

Michael P. Cascino
Cascino Vaughan Law Offices
220 S. Ashland Avenue
Chicago, Illinois 60607
(312) 944-0600

**Verified Work History**

I, Gary Suoja being duly sworn, according to law, depose and state as follows:

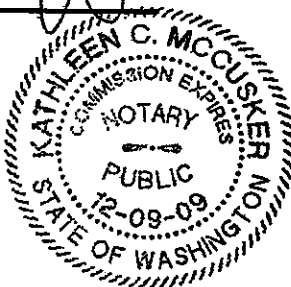
1. My name is Gary Suoja, and my social security number is 357-34-0512. I reside at 4880 90th Place SE, Mercer Island, WA 98040. Oswald F. Suoja was my Father and his social security number was 475-20-3647. (Relation)
2. To the best of my recollection, Oswald F. Suoja worked as an asbestos worker at the following sites:

Site	City	State	First Year at Site	Last Year at Site
Badger Ordnance Works	Baraboo	WI	1954	1956
Barber Colman	Rockford	IL	1945	1984
Borg Warner	Ottawa	IL	1945	1984
Commonwealth Edison	Joliet	IL	1945	1984
Dean Foods Company	Harvard	IL	1945	1984
Del Monte Corp	Rochelle	IL	1945	1984
Greenlee Tool	Rockford	IL	1945	1984
Kelsey-Hayes-Gunite Division	Rockford	IL	1945	1984
Litton/ Gardner Machine Shop	South Beloit	IL	1945	1984
Milwaukee House Of Correction	Milwaukee	WI	1952	1954
Quaker Oats	Rockford	IL	1945	1984
Rochelle Company Generating Company	Rochelle	IL	1945	1984
Rockford Drop Forge	Rockford	IL	1945	1984
Rockford Memorial Hospital	Rockford	IL	1945	1984
Sundstrand	Rockford	IL	1980s	1970s
Tanners Creek Power Station	Lawrenceburg	IN	1951	1952
Truck Components Gunite	Rockford	IL	1945	1984
Warner Lambert	Rockford	IL	1945	1984
White Sundstrand	Belvedere	IL	1945	1984

Further Affiant Sayeth Naught.

Subscribed and sworn to before me
this 17th day of Dec, 2006

Notary Public



Signature
Personal Representative of
Oswald F. Suoja

Exhibit "A"

CERTIFICATE OF SERVICE

I hereby certify under penalties as provided under 28 U.S.C. Sec. 1746 that I served this Request for Production of Documents upon the attorney listed below by depositing a true and correct copy of same in the U.S. mail, with proper postage prepaid, at 220 S. Ashland Ave., Chicago, IL 60607, on March 11, 2008.

Robert Riley
Schiff Hardin LLP
233 S Wacker Drive
Chicago, IL 60606


Arlene J. Kaminski

Michael P. Cascino
Cascino Vaughan Law Offices
220 S. Ashland Ave.
Chicago, IL 60607
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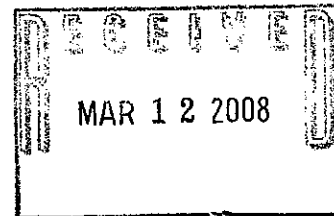


EXHIBIT B

Owens

FILED

7002 NOV 12 PM 4:11

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
Owens Corning, et al.,
Debtor(s). Bankruptcy #00-03837 (JKF)

Wilmington, DE
October 28, 2002
3:00 p.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Debtor(s):

Kate Stickles, Esq.
Saul, Ewing, LLP
222 Delaware Ave.
Wilmington, DE 19899

Charles O. Monk, II, Esq.
Saul, Ewing, LLP
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Baltimore, MD 21201

William A. DeStefano, Esq.
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Centre Sq. West
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Philadelphia, PA 19102

Mary Beth Hogan, Esq.
Debevoise & Plimpton
919 Third Ave.
New York, NY 10022

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732-329-0191

[Signature]

1	For Owens Illinois:	Paul Bradley, Esq. McCarter & English 919 N. Market Ste. Wilmington, DE 19899
2		
3	For Bank of America:	Eric Suttty, Esq. The Bayard Firm 222 Delaware Ave.-Ste. 900 Wilmington, DE 19899
4		
5		
6		Josef Athanas, Esq. Latham & Watkins Sears Tower 233 South Wacker Dr.-Ste. 5800 Chicago, IL 60606
7		
8		
9	For New York Packaging: Corporation	Richard Parks, Esq. McDonald, Illig, Jones & Britton, LLP 100 State St.-Ste. 700 Erie, PA 16507
10		
11		
12	For Creditor's Committee:	William Sudell, Esq. Morris, Nichols, Arsht & Tunnell 1201 North Market Street Wilmington, DE 19899
13		
14		
15		James I. McClammy, Esq. Davis, Polk & Wardwell 450 Lexington Ave. New York, NY 10017
16		
17		
18		Laura Jankolovits, Esq. Mayer, Brown, Rowe & Maw 190 South LaSalle St. Chicago, IL 60603
19		
20	For Futures:	Edmund M. Emrich, Esq. Kaye, Scholer, LLP 425 Park Ave. New York, NY 10022
21		
22		
23		
24		
25		

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732-329-0191

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& Taylor, LLP
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4 For Official Committes of:
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6
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8 Caplin & Drysdale
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10 Campbell & Levine, LLC
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11 Special Counsel For:
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Wilmington, DE 19801

15 John Berringer, Esq.
16 Anderson, Kill & Olick
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New York, NY 10020

17 For U.S. Trustee:
18
19 Frank J. Perch, III, Esq.
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Lock Box 35
Wilmington, DE 19801

20 Audio Operator:
21 Sherry Scaruzzi

22 Transcribing Firm:
23
24 Writer's Cramp, Inc.
6 Norton Rd.
Monmouth Jct., NJ 08852
732-329-0191

25 Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

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732-329-0191

1 THE COURT: Ready in Owens? Okay.

2 (Pause in proceedings)

3 THE COURT: I guess we're waiting for a few people to
4 call in, but maybe we can get a couple of entries of
5 appearances. Mr. Glassman and Mr. Winiarski?

6 MS. STICKLES: Mr. Winarski will not be appearing
7 now, Your Honor, unless his appearance becomes necessary. So
8 I believe the only person appearing telephonically is Mr.
9 Glassman.

10 THE COURT: Okay. Well, he should be calling in
11 shortly, so go ahead and enter you appearance and we'll see --

12 MS. STICKLES: Good afternoon, Your Honor. Kate
13 Stickles on behalf of Owens Corning, et al. With me today is
14 Charles Monk from Saul, Ewing, as well as William DeStefano
15 from Saul, Ewing, and also with the Debtors is Mary Beth
16 Hogan, from the Debevoise lawfirm.

17 THE COURT: All right. Anyone on this side want to
18 enter appearances, or only if you speak?

19 ALL: (No verbal response).

20 THE COURT: Okay. If you speak, then tell me your
21 name before you do, please. Can we deal with anything without
22 Mr. Glassman?

23 ALL: (No verbal response).

24 THE COURT: Well, I guess I can tell you what I've
25 taken care of. All right.

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732-329-0191

1 I have entered Orders as they were presented in the
2 hearing binders, on Items #7 through 13. And also, 1 and 2.
3 I have entered Orders. I have not yet found that -- an Order
4 with respect to Item #1, that you indicated has not hit the
5 docket yet, so I'm still looking to see what happened. I
6 thought I signed that at the last hearing, but apparently it
7 hasn't made the docket, so I'll be contacting you if I can't
8 find it, to get another copy of it. But in any event, I've
9 entered the seventh Order, which is the one that you sent in
10 with the CNO, but I'm still looking for the sixth. Okay.
11 That's on agenda #1.

12 On agenda #4, I entered the First Supplemental Order
13 that you sent to the hotel. On agenda #5, I entered the Order
14 that permits the reply brief. On agenda #14, I added a "So
15 Ordered" line to the Notice of Withdrawal of that motion. On
16 agenda #15, I signed an Order --

17 (The Court locates document)

18 THE COURT: -- oh. The one that was attached to the
19 Certification of the Counsel. That permits the Debtor to
20 extend and modify the D-I-P financing term.

21 Also, continued for hearing according to the agenda,
22 despite the Orders that I've entered, are item numbers 1, 2,
23 3, 4 and 6. On 3, you told me that a stipulation is due. I
24 don't know whether you have that today, or if that's something
25 you're going to be filing.

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732-329-0191

1 MS. STICKLES: Your Honor, that stipulation will be
2 filed. It's not complete yet.

3 THE COURT: Okay. So, then, for hearing today,
4 according to what I understand, I should be have -- have
5 hearings on items 5, 16, 17 and the status report on 18.

6 MS. STICKLES: That is your correct -- that is
7 correct, Your Honor. As I can tell from the docket, all of
8 the Orders you've signed have been docketed except for the
9 Order with regard to agenda item 10.

10 THE COURT: Miss Bello indicated right at lunch time
11 that she hadn't gotten that one done yet. That there was one.
12 She didn't tell me the number. But wait, I'm not sure I
13 entered one on 10. Yes, I did. 6 through 13. That must be
14 the one that she hasn't -- hadn't gotten as of lunch time. So
15 it should be on today.

16 MS. STICKLES: Thank you, Your Honor. Then without
17 further comment, I'd like to turn the podium over to Owens-
18 Illinois counsel for agenda item 5, which is that Motion to
19 Lift Stay.

20 THE COURT: Do we need Mr. Glassman for this?

21 MR. ATHANAS: Your Honor, I'm Joe Athanas, I
22 represent McNamara, Diamond, Mr. Glassman's lead counsel. We
23 don't need him.

24 THE COURT: All right. Thank you.

25 MS. STICKLES: Thank you.

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Certified Court Transcribers

732-329-0191

1 (Counsel steps forward)

2 MR. BRADLEY: Good afternoon, Your Honor.

3 THE COURT: Good afternoon.

4 MR. BRADLEY: Paul Bradley on behalf of Owens-
5 Illinois. Owens-Illinois has asked the Court to lift the stay
6 so that it can obtain, in essence, sales invoices for Owens
7 Corning Kalo product from 1953 through about 1972. These
8 invoices are contained on CD-ROMs and the controversy is
9 resolved in some part, because Owens Corning agreed to produce
10 the 16 CD-ROMs that have the actual invoices on them, as well
11 as allow access in the event that we need hard copies, if for
12 some reason they're illegible.

13 The one remaining contention is that they should not
14 be required to produce the -- I believe it's a CD that has the
15 database on it. The database is the critical part of the
16 entire set, which allows anyone using the 16 CDs to perform a
17 search to find out, for instance, where a Kalo product was
18 shipped in a period of time from '53 to '72, and without that
19 ability to search the CDs, they're, in essence, useless.
20 We're talking about over -- or approximately 100,000 documents
21 that are contained on this 16-CD set.

22 In the papers, Owens Corning has alleged that
23 production of this database is protected by the Work Product
24 Doctrine by opinion work product. And our position is that it
25 is not covered by opinion work product, that, indeed, if there

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 is opinion work product on this database somehow, then they
2 are free to redact it. We don't want that information. What
3 we want is what you might call the objective fields which show
4 where the product was shipped to, the dates that it was
5 shipped, the purchaser, if that's identified.

6 At best, it could be characterized as factual work
7 product, because they did prepare it at some point, I think,
8 during the course of the asbestos personal injury litigation,
9 and in that respect there's obviously substantial need by my
10 client. My client is still involved in thousands of personal
11 injury cases that are pending throughout the United States,
12 and they need the information in order to defend themselves
13 against certain allegations of product exposure. For
14 instance, a plaintiff claims he was exposed at Plant A in
15 Wilmington, Delaware, and this database can be used to
16 demonstrate that Kalo was not shipped to that particular site
17 during the relevant years for Owens-Illinois, which would be
18 the period of time of '53 to 1958 in these circumstances. So,
19 therefore, it's obviously a very important tool that could be
20 used by Owens-Illinois.

21 Also, it -- the plaintiffs in the cases -- obviously,
22 the events that we're talking about occurred in the 1950s so
23 these events occurred 40 and 50 years ago, and their
24 recollection at this point in time about what product was
25 shipped where or whether it was present at a site that they

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1 worked on is pretty much unreliable. And the only proof
2 that's out there of what was actually shipped, where it was
3 shipped and how much, is in the control of Owens Corning and
4 this database which allows one to search on it.

5 THE COURT: And why can't you develop your own
6 database to allow a search?

7 MR. BRADLEY: We actually -- a plaintiff's firm did
8 develop a database to do just that. Owens-Illinois
9 participated -- or, didn't participate to develop it, but
10 bought into that and used it and it was completely, totally,
11 unusable, has disappeared now. It's not even something that
12 can be used. So based on that experience, it's their belief
13 that they need the Owens Corning database CD. In addition to
14 that, it would be an undue hardship to require this company to
15 expend time, effort and money --

16 THE COURT: Why? Otherwise you'll get hard copies
17 and what are you gonna use to search then?

18 MR. BRADLEY: Well, that's the point. This database
19 that they have is already in existence and before they came
20 into the Bankruptcy Court, Owens-Illinois had the opportunity
21 to go to Owens Corning in the course of litigation out there,
22 and say, "We need invoices for Plant A in Wilmington, Delaware
23 for this period of time," and Owens Corning would produce that
24 information, and on occasion, a witness would be deposed to
25 authenticate that information in order to prove that that

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1 exposure did not occur or that the product was delivered
2 later, in 1960s, or something to that effect.

3 So if you look at pre-bankruptcy, we had access to
4 this information and we used it and it was available through
5 the regular Court system. Now, the reason it's not available
6 is simply because of the bankruptcy status.

7 THE COURT: Well, the work product issue wouldn't
8 change whether there's a bankruptcy or not a bankruptcy. And
9 I'm not --

10 MR. BRADLEY: Well --

11 THE COURT: -- hearing that there's an objection
12 because the Debtor is bankruptcy, I'm hearing there's an
13 objection because they think that there's something on -- that
14 will either lead to someone to conclude what their attorneys
15 feel is a litigation strategy or something else to deal with
16 the way the data's put together that you're not -- your client
17 and no one else is entitled to. They're agreeing to give you
18 the underlying data.

19 MR. BRADLEY: Correct. But the issue is that without
20 the ability to search these hundred thousand documents,
21 they're, in essence, useless to anyone. In --

22 THE COURT: But that's what I'm -- I'm still not
23 gathering. Is the software in which the database was put
24 together proprietary?

25 MR. BRADLEY: I don't have an answer to that, Your

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1 Honor. I know that in one case that they cited in California,
2 the Judge ordered them to produce the database with certain
3 fields revealed and to redact -- apparently redact what they
4 believed was opinion work product. We're, in essence, asking
5 a similar thing here. Produce the fields that aren't opinion
6 work product, redact those fields that are, and if there's
7 then an issue about it, we could approach the Court and have
8 the Court examine it in camera.

9 But at least one Court has already required them to
10 produce that, and if they had a work product issue, before
11 this -- before the bankruptcy, they clearly gave this
12 information to other parties. They've controlled it, but they
13 -- you -- the process was to go to Owens Corning, request the
14 information you needed, and you would get it. And I don't
15 think, based on what's in the record to date, that there's any
16 evidence or proof that there's any material in this that's
17 covered by the opinion work product rule.

18 In addition, you asked about the cost and expense and
19 why doesn't Owens-Illinois just go do it on its own. In, I
20 think it's the Washington Bank Corp. case that I cited in our
21 reply brief, the Court was faced with a similar situation. It
22 was an index prepared by the one party to about 2500 boxes of
23 documents, and the other side said, "Hey, go prepare your own
24 index. You can do that as easily as we did it." And the
25 Court there held that that would be an undue hardship

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1 because --

2 THE COURT: But you're not asking for a database,
3 you're asking for a search function, and what I don't -- what
4 I'm still not gathering is what -- what is the software in
5 which this data has been logged onto the CDs? If it's
6 searchable data, then you ought to be able to do a search
7 function. So if what you need is source code to let you
8 develop a search function, I don't know why you can't be given
9 that information, but I'm not sure why I should require the
10 Debtor to turn over something that's work product.

11 MR. BRADLEY: If I -- I'm not asking for any opinion
12 work product. If they have codes that we can use to then make
13 the same database, then that's a potential solution. I'm not
14 sure about that. I don't know. We don't have that
15 information available to us.

16 THE COURT: Well, let me find out from the Debtor
17 what they can do.

18 MR. BRADLEY: Thank you.

19 MS. HOGAN: Good afternoon. Mary Beth Hogan for the
20 Debtor. There seems to be a little -- a few misunderstandings
21 or -- lack of clarity about what we're talking about. O-I
22 raises the point that in -- when we were in the tort system,
23 when Owens Corning was in the tort system, they could ask for
24 searches of particular work sites or particular years or
25 geographic areas, and that was fine with them and we complied

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1 with those requests, and now that we're in the bankruptcy,
2 that's not -- no longer available. That's incorrect. We have
3 no problem with providing discreet answers to discreet
4 questions, and that happened all the time in the tort
5 litigation, and we will respond then as -- now as we did then.
6 The fact of the bankruptcy, as you pointed out, makes
7 difference.

8 The -- in the tort system, what happened was -- the
9 regular way that this proceeded was there would be discovery
10 requests or interrogatory requests for information about a
11 particular site, and we would provide that. Sometimes
12 plaintiffs would push harder and want all the sites in
13 Illinois, or all the sites in Illinois for 30 years, and we
14 would say, "No, that's too broad. We won't go that far
15 because it's irrelevant to this particular case."

16 Every once in a while, someone asks for the whole
17 database, which is what O-I is asking for now. And no Court
18 has ever ordered the production of the entire database, and it
19 is not merely fact work product. A very detailed, year-long
20 process went into making this database, and it involved first
21 selecting certain fields from the hard copy invoices that O-I
22 has; certain fields that Debtor's lawyers felt was important
23 to the litigation. After the fields were selected and that
24 information was input into the database, then lawyers for the
25 Debtors standardized all the information. Sometimes there

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1 would be one company referred to in four different ways, for
2 example, over the course of the 30-year distribution period.
3 And it was important that we figure out all of the shipments
4 to a certain particular site. The lawyers used their
5 experience in the asbestos litigation to standardize that.
6 The lawyers then enhanced the facts that came from the
7 invoices in several different ways, all of which are protected
8 opinion work product.

9 For example, there would be situations where there
10 would be a day in the -- a month, a day and a year, and the
11 year would be missing, and then the attorneys would look at
12 the hard copies and try to figure out if there was some other
13 information on that invoice that they could glean the year
14 from. If not, the attorneys often did outside research based
15 on their experience in the asbestos litigation in different
16 areas of the country, and they filled in information that is
17 not contained on the 97,000 hard copy invoices. So there is
18 extra material that was devised by then Owens Corning defense
19 counsel for use in the litigation.

20 And so, the -- our position is that it is opinion
21 work product, and even if the Court were to find that it was
22 not opinion work product, or that part of it was not opinion
23 work product, there's been no showing that there's a
24 substantial need or undue hardship present here. O-I has been
25 in this litigation for 30 years without our database and has

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1 actually managed to stay out of bankruptcy during that whole
2 time. To say that it has a substantial need, that it can't go
3 forward, it -- it just doesn't make sense, especially in light
4 of the fact that we will provide it with the answers to
5 reasonable search requests.

6 THE COURT: All right. Well, I'm still confused. If
7 Owens Corning is able to extract only certain fields that it
8 knows were taken from the hard documents, and provide that
9 information on CD-ROM, then the question still is why can't
10 you provide a search function for that database? So that you
11 can delete whatever it is that you feel is protected.

12 MS. HOGAN: Well, because the work product is
13 imbedded. There --

14 THE COURT: Well, then, how can you produce it at
15 all?

16 MS. HOGAN: Because --

17 THE COURT: How can you produce the data at all if --

18 MS. HOGAN: Well, no --

19 THE COURT: -- work product is imbedded?

20 MS. HOGAN: What we do is we get a request, say, O-I
21 has a case involving the Weyerhaeuser plant in Wisconsin, and
22 they say, "Please produce all Kalo invoices to the Weyerhaeuser
23 plant between the years 1953 and 1972." We use the database
24 to do a search on the Weyerhaeuser plant, and we can produce
25 the hard copy invoices, all of them, however many there are,

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1 2, 20, 200, to the Weyerhaeuser plant, and then they have that
2 for their cross examination of plaintiffs or claimants or co-
3 workers. That's all they need. The database has extra things
4 on it that Owens Corning lawyers put on there.

5 THE COURT: Yes, but they're not -- Owens-Illinois
6 isn't asking for the extra things. It's asking for the copies
7 of the invoices --

8 MS. HOGAN: Which it has.

9 THE COURT: -- for all of the Kalo -- all of the Kalo
10 invoices, let's put it that way, and some search key that lets
11 it search through those invoices. So -- I'll just make this
12 up, because obviously I don't what the litigation's about --
13 but, let's say Owens-Illinois is trying to find out whether
14 the same plaintiff has made a claim for working in more than
15 one plant and it wants to search on the plaintiff's name.
16 Then it wants to be able to hit whatever key you'd -- it would
17 bring up a search field, let you type in the name of the
18 plaintiff and find out whether that same plaintiff has made a
19 claim in -- for working at the same time period in more than
20 one plant. So --

21 MS. HOGAN: Well -- that example, the database
22 wouldn't include any plaintiff-specific information.

23 THE COURT: Okay. Then --

24 MS. HOGAN: It only --

25 THE COURT: -- let's say --

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1 MS. HOGAN: -- it only --

2 THE COURT: -- all right. It includes the plants.

3 MS. HOGAN: It would have plants, right. And so if
4 O-I said to us, "We think this guy also worked at an Owens
5 Corning plant, give us the invoices for the Owens Corning
6 plant," we would do that. We would use the database and
7 provide that to them. We would give them what they need.
8 What we don't want to give them is the database which has the
9 imbedded work product in it.

10 THE COURT: So it's not the invoices that have the
11 imbedded work product, it's your --

12 MS. HOGAN: Correct.

13 THE COURT: -- search function database.

14 MS. HOGAN: Correct.

15 THE COURT: Okay. Then the question is, why can't
16 the source code -- because I don't know how this is created --
17 is it possible to do -- to provide a search function without
18 providing the imbedded information?

19 MS. HOGAN: My understanding is that in one Court in
20 California has so ordered, that, I think, five different
21 fields are not opinion work product, and they include invoice
22 number -- there are a number of other fields that I can get
23 you if you're interested.

24 THE COURT: I've got it in papers.

25 MS. HOGAN: Okay. And that is something, you know,

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1 we think the whole thing should be protected, but if there's
2 gonna be any disclosure, we would, you know, the disclosure of
3 those five fields, we could live with that.

4 THE COURT: Okay. But I don't know whether that gets
5 to the issue of search function.

6 MS. HOGAN: Well, I don't think it gets to the issue
7 of where the product was shipped, which is, I think, their --
8 the principal thing that O-I -- has identified as wanting.
9 And the reason that it doesn't -- that no Court has ever
10 ordered that field, we call it the "ship-to" field, produced,
11 is that it is heavily imbedded with work product. It took a
12 lot of discerning from the raw data to get to the information
13 that is now contained in the ship-to field.

14 And this is -- this is not something that is gone and
15 it has disappeared in importance to OC now that it's in
16 bankruptcy. We have an insurance coverage litigation. We've
17 claimed the privilege and the results of that could impact on
18 the recovery of the Estate for the Estate.

19 So what I would suggest is that if O-I, in the
20 future, has particular cases that it needs information from
21 the Kalo database, it -- we can set up some kind of a contact
22 person for them to deal with at either Owens Corning or
23 outside counsel and those search results will be provided.

24 THE COURT: All right. These invoices, were they
25 scanned in somehow? Is that what you're looking at, a

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1 scanned-in image?

2 MS. HOGAN: Yes. They're -- we have hard copies and
3 then there are 16 CDs of scanned-in images. And some of those
4 images are apparently imperfect, which is why we have offered
5 O-I any hard copies it wants if it finds a scanned image
6 that's -- in some way is inadequate for them.

7 THE COURT: Okay. All right. Thank you. Mr.
8 Bradley? What exactly are you trying to search for?

9 MR. BRADLEY: We're trying to search -- the invoices
10 contain information about the -- the number of feet that Kalo
11 was -- of Kalo that was sold to company A, that would be on
12 the invoice. On the invoice would be "shipped to" company A's
13 plant in Wilmington, Delaware and the dates that that was
14 shipped or purchased. That's what we're looking for. That is
15 all factual information. It has nothing to do with opinion
16 work product.

17 THE COURT: But apparently it does, because the --
18 the way the database is created, the information is not taken
19 from the invoice, it is taken from something that the
20 attorneys have superimposed from the invoices. So what you
21 really want is the capability of searching through a scanned
22 document. It seems to me you hire your software people, you
23 give them the scanned documents, and you tell them to go
24 search. Otherwise, the Debtor's made a reasonable proposal,
25 which is, tell them what else you want and they'll respond to

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1 it using the database for you, but they're not going to give
2 you their proprietary information, and I don't think they need
3 to.

4 MR. BRADLEY: Your Honor, there is -- I'm not sure of
5 the number of pending cases against Owens-Illinois. There's
6 probably 15, 16 thousand cases. So, as long -- if they're
7 willing to, when Owens-Illinois believes they have the need to
8 get the information, and set up a contact person to have that
9 information, and the Court's gonna rule against us, then we
10 have no choice.

11 MS. HOGAN: That's fine. I would just like to add
12 that, as when we were in the tort system, the requests need to
13 be narrowly tailored, and the copying costs and associated
14 costs should be borne by Owens-Illinois.

15 THE COURT: Owens-Illinois. Oh, sure. It seems to
16 me the costs are Owens-Illinois', their discovery costs. That
17 will have to be paid for, but I assume that the requests are
18 going to be reasonable. And definitely they should be limited
19 to whatever the context of the particular litigation is,
20 because if I'm overruling the request or not granting the
21 request for a wholesale disclosure, I'm not going to do it on
22 a piecemeal basis, either. But they've offered, and unless
23 there's a problem with their compliance with their offer --
24 and if there is, I assume I'll hear from you, Mr. Bradley --
25 then I think that's a reasonable request.

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1 MR. BRADLEY: Thank you. Okay, Your Honor. The -- I
2 just want to say that the -- the purposes of us coming here
3 was to save the Debtor the expense of doing this, but, you
4 know, in 16,000 cases, we're gonna have to approach them to
5 get the information.

6 THE COURT: Well, I don't know if you do in 16,000
7 cases. They've given you the invoices. And I'm not sure that
8 anybody, any law, requires the Debtor to do the discovery for
9 another company. They have to produce the documents that are
10 relevant. They are doing that. If you want to have somebody
11 develop a search function, go to it. Those 16 discs are
12 yours.

13 MR. BRADLEY: Thank you, Your Honor.

14 THE COURT: Okay. I'm not sure what form of an Order
15 you need, since you've agreed to -- have you already received
16 the CDs that they've --

17 MR. BRADLEY: No.

18 THE COURT: All right. So I need an Order that's
19 going to compel the Debtor to produce the invoices on CD-ROM,
20 and I think your concept of backup of the hard copy in the
21 event that the material is illegible is fine, and denies the
22 request for anything else without prejudice, based on the
23 Debtor's offer at this point to answer reasonable discovery
24 requests. So are you -- will the Debtor submit that Order,
25 run it by Mr. Bradley and then submit it?

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1 MS. HOGAN: Yes.

2 THE COURT: Okay.

3 MR. BRADLEY: Thank you, Your Honor.

4 THE COURT: Thank you.

5 (Pause in proceedings)

6 THE COURT: Miss Stickles?

7 MS. STICKLES: Your Honor, the next item on the
8 agenda is item #16, which is New York Packaging Company's
9 Motion for Summary Judgment, and I'd also note a related item
10 is item 17, the Debtor's Motion for Summary Judgment with
11 regard to the same underlying motion.

12 THE COURT: Yes. I think we probably should just
13 argue both of these together. It doesn't really make much
14 sense, since they're sort of flip sides of the same coin, if
15 that's okay with you.

16 MR. PARKS: That's fine, Your Honor.

17 THE COURT: Good afternoon.

18 MR. PARKS: Good afternoon, Your Honor. Richard
19 Parks on behalf of New York Packaging Corporation.

20 May it please the Court, this is the Motion for
21 Summary Judgment filed on behalf of New York Packaging in what
22 I believe to be a simple sales contract by the post-petition
23 Debtor, Owens Corning, for the sale of plastic sheets which
24 are used by Owens Corning at its refineries in order to stack
25 its products, its asphalt products, to keep them from sticking

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